The European Court of Human Rights' *Al-Jedda* and *Al-Skeini* Judgments: an Introduction and Some Reflections

Dr. Frederik Naert

*Director, Military Law and the Law of War Review**

On 7 July 2011, the European Court of Human Rights (Grand Chamber) issued two judgments in cases brought against the UK with regard to the conduct of its forces in Iraq: *Al-Jedda v. UK* (Application No. 27021/08) and *Al-Skeini. UK* (Application No. 55721/07). The judgments address several issues that are of key importance for the applicability and relevance of the European Convention on Human Rights (ECHR) to/for military operations abroad and for the implications of the ECHR for such operations when it does apply, as well as the relationship between the ECHR on the one hand, and UN Security Council resolutions and international humanitarian law on the other hand.

Al-Jedda concerns detention by UK forces in Iraq after the occupation phase and gave rise to two main questions: (i) was the conduct of these forces attributable to the UK or to the UN?; and (ii) did UN Security Council Resolution 1546 (8 June 2004) justify/permit detention in circumstances not covered by Article 5 ECHR (on deprivation of liberty) and therefore displace, qualify, or derogate from, this ECHR provision? The judgment also touches upon the relationship between the ECHR and international humanitarian law. The Court decided that the conduct was attributable to the UK; that Resolution 1546 did not explicitly impose measures violating Article 5 ECHR; and that the latter fully applied. It concluded that the UK had breached Article 5 ECHR.

Al-Skeini concerns the death of six Iraqis during the period of British occupation: five as a result of shootings and one in detention. The main questions in this case were (i) the scope of extraterritorial application of the ECHR; and (ii) the scope and extent of the duty to investigate possible breaches of Article 2 ECHR (the right to life) as a consequence

* Member of the Legal Service of the Council of the EU and affiliated senior researcher at the KU Leuven. The views expressed are solely my own and do not bind the Council or its Legal Service.

of the conduct of armed forces in an occupied territory, where international humanitarian law (also) applies. The Court found that all six Iraqis were within the jurisdiction of the UK and that the ECHR was therefore applicable. It then held that the duty to investigate deaths at hands of State agents applies even in occupations or armed conflicts and that this duty had been violated in five of the six cases.

Given the importance of these cases for military operations, the editorial board is pleased that we have been able to include in this issue an agora on these judgments, offering a range of perspectives by Heike Krieger, Francesco Messineo, Kjetil Mujezinovic Larsen and Anne-Marie Baldovin. Anne-Marie Baldovin's contribution (written in French) covers both cases and deals with most of the above-mentioned aspects. By contrast, the contributions by Francesco Messineo and Kjetil Mujezinovic Larsen both focus specifically on attribution. The latter also addresses extraterritorial derogations. That issue is dealt with more extensively in Heike Krieger's contribution. That contribution examines in particular the relationship between the ECHR and international humanitarian law.

As this is only an introduction and not a full contribution, I will refrain from adding my own detailed analysis of the two judgments.[1] Nevertheless, I cannot resist offering some brief reflections.

1. In the light of the definition of occupation under international humanitarian law and the Court's previous case-law on occupied territories and territories controlled by or through armed forces, it can hardly come as a surprise that, in *Al-Skeini*, the Court found that the ECHR did apply to the conduct of UK forces in Iraq during the occupation phase (as regards the shooting incidents, it did so contrary to the conclusions reached by the British courts, which found that the ECHR only applied to the detention case[2]). However, that the Court arrives at this conclusion on the basis of 'State agent authority and control' rather than effective control over territory (§ 149) is arguably

[1] My views on most of the issues concerned, including on the House of Lords judgments in both cases, are set out in F. Naert, *International Law Aspects of the EU's Security and Defence Policy, with a Particular Focus on the Law of Armed Conflict and Human Rights* (Antwerp, Intersentia, 2010), especially pp. 499-526 and 541-658.

[2] See House of Lords, *R (Al-Skeini and others) v Secretary of State for Defence*, 13 June 2006, [2007] UKHL 26, http://www.publications.parliament.uk/pa/ld200607/ldjudgmt/jd070613/skeini-1.pdf (incl. references to the lower courts' findings).

less obvious and may be significant for incidents involving the use of force in other situations.

2. In *Al-Skeini* the Court attempted to set out systematically its view on the extraterritorial scope of application of the ECHR (§§ 130-142). Whether or not one agrees with the Court's views and reasoning, e.g. on the different categories/scenarios, the judgment provides at least some clarification as to where the Court stands on this issue.

3. The Court's acceptance in this scheme that the ECHR rights can be 'divided and tailored' (§ 137) is a welcome and major departure from what it held in *Bankovic*.[3]

4. As argued by several of the contributions in this agora, the test for attribution may still not be entirely clear, in particular as the Court, in *Al-Jedda*, did not openly overrule the 'ultimate authority and control' test which it applied in *Behrami and Saramati*[4]. Nevertheless, in *Al-Jedda* the Court's reasoning and decision are undoubtedly more in conformity with the attribution rules under international law than those in *Behrami and Saramati* and clearly correspond better to reality. One might expect that even if the *Behrami and Saramati* test survives, in the future it will only apply and be met very exceptionally.

5. The (arguably excessive) deference which the Court showed for the UN Security Council in *Behrami and Saramati* has made room for a very critical attitude in *Al-Jedda*. This might in part be explained by the European Union's Court of Justice's similarly critical attitude.[5] It seems natural for the Court not to assume too readily that, in its resolutions, the Security Council intended to permit or impose derogations from human rights law. However, having regard to the quite specific language on

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3 Grand Chamber, *Vlastimir and Borka Bankovic and others against Belgium, and others* (Application No. 52207/99), decision on admissibility, 12 December 2001, § 75.

4 Grand Chamber, *Behrami and Behrami v. France* (Application No. 71412/01) and *Saramati v. France, Germany and Norway* (Application No. 78166/01), (joined) decision on admissibility, 31 May 2007. In this decision, the conduct of the NATO-led operation KFOR in Kosovo was attributed to the UN which, according to the Court, exercised ultimate authority and control over it, through the Security Council.

5 That case is referred to in the *Al-Jedda* judgment, §§ 51-53. See Case C-402/05 P, *Kadi v. Council and Commission*, 3 September 2008. This judgment overturned the Court of First Instance's judgment in this case. That court, now renamed the General Court, has, however, continued to express dissenting views: see Case T-85/09, *Yassin Abdullah Kadi v. Commission*, judgment of 30 September 2010 (appeal pending: see joined cases C-584/10, 593/10 and 595/10).

security detention in the letter annexed to Resolution 1546, the Court arguably goes rather far in interpreting the Security Council's intention. The Court also gives a very narrow reading of when obligations under the UN Charter conflict with and prevail over the ECHR.

6. The previous observation has significant implications for security detention in military operations, at least in cases whether international humanitarian law does not apply. I fully share Heike Krieger's assessment that European States desiring to conduct such detentions in operations abroad will either need to seek an explicit Security Council mandate to derogate from human rights obligations that prohibit such detention or will have to formally declare a derogation under Article 15 ECHR.[6] I consider that the latter would be legally possible.[7] It will be interesting to see whether and how the Copenhagen process on the Handling of Detainees in International Military Operations[8] (to which the Court refers in § 58) will address these implications. Furthermore, the judgment does not offer any guidance as to the extent to which any derogation would be permissible, notably on what procedural safeguards would have to be put in place as a minimum.[9]

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6 In the absence of a derogation being declared and invoked, the Court has applied the ECHR in full also in other cases of armed conflict or serious internal disturbances, see e.g. *Isayeva, Yusupova and Bazayeva v. Russia* (Applications Nos. 57947/00, 57948/00 and 57949/00) and *Isayeva v. Russia* (Application No. 57950/00), both judgments of 24 February 2005.

7 See F. Naert, *supra* note 1, pp. 577-580. While several law lords were skeptical in this respect (House of Lords, *Al-Jedda, R (on the application of) v Secretary of State for Defence*, 12 December 2007, [2007] UKHL 58, http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd071212/jedda.pdf, §§ 38, 132 and 150), the Court seems to leave open this possibility in § 100 of the *Al-Jedda* judgment. Note that before the House of Lords, the UK Government did not accept that it could not have derogated (§ 38 of the House of Lord judgment).

8 For the start of this process, see Danish Ministry of Foreign Affairs, Legal Service, Copenhagen Conference on 'The Handling of Detainees in International Military Operations', 11 - 12 October 2007, *Non-Paper on Legal Framework and Aspects of Detention*, 4 October 2007 with accompanying note on the 'Copenhagen Process on The Handling of Detainees in International Military Operations', published in Vol. 46 (2007) of this *Review*, pp. 363-392.

9 This point was quite rightly raised by Baroness Hale in the House of Lord judgment (*supra* note 7), §§ 126-129, albeit in relation to the extent of the derogation under Resolution 1546 ('The right is qualified but not displaced. ... The right is qualified only to the extent required or authorised by the resolution. What remains of it thereafter must be observed. This may have both substantive and procedural consequences'). Similarly, in that judgment Lord Carswell took the view that the power to intern 'has to be exercised in such a way as to minimise the infringements of the detainee's rights under article 5(1) ..., in particular by

7. These judgments clarify to some extent the relationship between the ECHR and international humanitarian law, which the Court has only recently explicitly addressed. In particular, in *Varnava* the Court stated that 'Article 2 must be interpreted in so far as possible in light of the general principles of international law, including the rules of international humanitarian law' (emphasis added).[10] The way in which the Court rather summarily dismisses security detention under the law of occupation in paragraph 107 of *Al-Jedda* raises the question whether it does not impose rather strict limits on the degree to which interpretation of the ECHR in the light of international humanitarian law is possible,[11] and whether it will accept the partial displacement of ECHR rights in case of conflict with rules of international humanitarian law, in those cases in which the *lex specialis* principle would justify this. The Court's findings in *Al-Skeini* clearly imply that the right to life

adopting and operating to the fullest practicable extent safeguards of the nature of those to which I referred ... above' (§ 136), i.e. 'the compilation of intelligence about such persons which is as accurate and reliable as possible, the regular review of the continuing need to detain each person and a system whereby that need and the underlying evidence can be checked and challenged by representatives on behalf of the detained persons, so far as is practicable and consistent with the needs of national security and the safety of other persons' (§ 130). See also the lower court judgment: England and Wales Court of Appeal (Civil Division), *The Queen (on the application of Hilal Abdul-Razzaq Ali Al-Jedda) v. Secretary of State for Defence*, 29 March 2006, [2006] EWCA Civ 327, § 87, http://www.bailii.org/ew/cases/EWCA/Civ/2006/327.html.

10 *Varnava and Others v. Turkey*, 18 September 2009 (Applications Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90), § 185.

11 This prompts the question to what extent the Court's views might be specific to internment in occupied teritory (and by extension perhaps to internment of enemy civilans in a State's own territory in an international armed conflict), for which the question whether the rules of international humanitarian law can remain entirely unaffected by subsequent developments in human rights law may be more open than it is as regards the internment of prisoners of war. In fact, the European Commission on Human Rights appears to have distinguished between both in one of its early Cyprus cases: see the Report of 10 July 1976 in *Cyprus v. Turkey*, 4 *E.H.R.R.* 1982, pp. 482-582, especially pp. 529-533 and 555-559, including points II.2-3 of the conclusions in Part IV. In particular, it did not deem it necessary to inquire whether the internment of prisoners of war by Turkey was compatible with Article 5 ECHR because this was regulated by international humanitarian law (§ 313). In contrast, with regard to interned civilians, it held that Article 5 ECHR was violated (§ 310) and did not refer to international humanitarian law on this point. It concluded that there was a violation of Article 5 ECHR with regard to the detention of civilians and that it was not necessary to examine whether Article 5 had been violated by the internment of prisoners of war (see also the contribution by Heike Krieger on this case).

under the ECHR continues to apply even in situations of occupation, subject only to derogation in respect of deaths resulting from lawful acts of war (§ 162). However, the case does not deal with the legality of the use of force itself but only with the duty to investigate cases involving deaths imputable to State agents. The Court held that this procedural obligation continues to apply also in armed conflict and occupation (§ 164).

8. *Al-Skeini* addresses the scope and extent of the duty to investigate possible breaches of Article 2 ECHR in an occupation. The Court accepted that there may be constraints to such investigations in these circumstances but stressed the requirements of independence, reasonable expedition and sufficient public scrutiny (§§ 164-167) and found that five of the six investigations in this case did not meet the ECHR requirements (§§ 168-177). It also stated that civil proceedings undertaken on the initiative of next-of-kin which do not involve the identification or punishment of any alleged perpetrator are not sufficient, nor is merely awarding damages (§ 165). No doubt there will be discussion over whether the Court struck an acceptable balance and whether it set realistic standards. In this context, it should be noted that the UK accepted that for three of the cases the investigations fell short of what is required under the ECHR (§ 171).

Clearly, both judgments do not finally settle several of the issues raised. In any event, I hope our readers will enjoy the four contributions in this agora, and that this agora will feed their reflections on the implications of the two judgments for military operations.